IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ANNE WARFIELD, AN UNMARRIED WOMAN,
Plaintiff/Appellant,

v.

CITY OF TUCSON, A MUNICIPAL CORPORATION
OF THE STATE OF ARIZONA,
Defendant/Appellee.

No. 2 CA-CV 2013-0130
Filed February 12, 2014

Appeal from the Superior Court in Pima County
No. C20123445
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Hallinan Law Firm, Tucson
By Joane Hallinan and Nick Nogami
Counsel for Plaintiff/Appellant

Michael G. Rankin, City Attorney, Tucson
By Viola Romero-Wright and Michael W.L. McCrory,
Principal Assistant City Attorneys
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Anne Warfield appeals from the trial court's grant of summary judgment in favor of the City of Tucson on her claim arising from injuries sustained during a fall at the Reid Park Zoo. On appeal, Warfield argues the court erred in granting summary judgment because the recreational use immunity statute, A.R.S. § 33-1551, on which the City relied, does not apply to this case, alleged violations of the International Building Code ("IBC") and Americans with Disability Act ("ADA") building codes preclude its application, and she presented sufficient evidence of the City's gross negligence to avoid summary judgment. Warfield also argues the court abused its discretion when it denied her motion to amend her complaint. Because we conclude that summary judgment was appropriate and that the court did not abuse its discretion in denying Warfield's motion, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party opposing summary judgment. *Keonjian v. Olcott*, 216 Ariz. 563, ¶ 2, 169 P.3d 927, 928 (App. 2007). In July 2011, Anne Warfield and her son visited the Zoo. As Warfield descended a staircase into the lower level of the polar bear viewing exhibit, she slipped on water that was flowing slowly "over parts of the steps," fell, and suffered multiple injuries. After Warfield's accident, Zoo employees determined the water came from a leak that occurred when a shrubbery root ruptured a nearby buried irrigation pipe.

¶3 Warfield sued the City for her injuries, alleging negligence, gross negligence, and premises liability. After it answered, the City moved for summary judgment, contending it was immune from liability pursuant to the recreational use

immunity statute, A.R.S. § 33-1551. The trial court granted the City's motion, finding that the recreational use immunity statute applied and that Warfield had not shown the City was grossly negligent. After considering the effect of the ADA building codes and the IBC, the court also denied Warfield's motion to amend her complaint to include a claim for negligence per se based on those codes, finding such an amendment would be futile. We have jurisdiction over Warfield's appeal pursuant to A.R.S. §§ 12–120.21(A)(1) and 12-2101(A)(1).

Motion for Summary Judgment

¶4 Warfield contends the trial court erred in granting summary judgment to the City based on the recreational use immunity statute because, first, the statute does not apply to this case, second, the stairwell on which she fell violated the IBC and ADA building codes and, third, she provided sufficient evidence of the City's gross negligence. On appeal from summary judgment, we determine de novo whether there are any genuine issues of material fact and whether the trial court correctly applied the law. *See Dayka & Hackett, LLC v. Del Monte Fresh Produce N.A.*, 228 Ariz. 533, ¶ 6, 269 P.3d 709, 711-12 (App. 2012). The court should grant summary judgment when "the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). A mere scintilla of evidence or a slight doubt as to whether a material factual dispute exists is not sufficient to overcome summary judgment. *Orme Sch. v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶5 Warfield appears to argue that the trial court erred in finding the recreational use immunity statute applies to this case. That statute states that the public or private owner of "premises" is not liable to a "recreational or educational user" unless the owner directly causes injury to the user through "wilful, malicious or grossly negligent conduct." A.R.S. § 33-1551(A). "Premises" includes "park[s], open space[s] . . . and any other similar lands, wherever located, that are available to a recreational or educational user." § 33-1551(C)(4). An "educational" or "recreational user" is "a person to whom permission has been granted or implied without the payment of an admission fee or any other consideration to enter

premises to participate in an educational program, including but not limited to, the viewing of . . . natural . . . sights . . . [or] to exercise . . . or engage in other outdoor recreational pursuits." § 33-1551(C)(1), (5). Additionally, a "nominal fee . . . [used] to offset the cost of providing the . . . premises and associated services does not constitute an admission fee." § 33-1551(C)(1), (5).

¶6 Here, Warfield concedes she would be considered either a recreational or educational user under the statute. The admission fee paid by visitors like Warfield, along with other generated income by the Zoo, accounts for approximately fifty to sixty percent of the Zoo's operating costs, while the remainder is subsidized by the City. Therefore, because the Zoo is available to both "recreational" and "educational users," and the admission fee is only a "nominal fee" used to offset operating costs, the Zoo is immune from liability by reason of the recreational use statute absent a showing of "wilful, malicious or grossly negligent conduct." *See* § 33-1551(A).

Building Code Violations

¶7 Warfield next argues the immunity statute should not apply because the stairway on which she fell violated both ADA building codes and the 2003 IBC.[1] Warfield contends that she need not demonstrate gross negligence to overcome the immunity because the violations themselves defeat the immunity.

¶8 But the immunity from liability provided to recreational use land owners can, by the plain language of the statute, only be overcome upon a showing of "wilful, malicious or grossly negligent conduct." § 33-1551(A). "'When the plain text of a statute is clear and unambiguous there is no need to resort to other methods of statutory interpretation to determine the legislature's intent because its intent is readily discernable from the face of the statute.'" *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, ¶ 8, 266 P.3d 349, 351 (2011), *quoting State v. Christian*, 205 Ariz. 64, ¶ 6, 66 P.3d 1241, 1243

[1]The 2003 IBC was adopted by the City of Tucson in 2004. Tucson, Ariz., Ordinance 10035 (Sept. 7, 2004); *see also* Tucson City Code, part II, ch. 6, art. III, § 6-34 (adopting the IBC).

(2003). Had the legislature intended land owners to be subject to liability for building code violations, in addition to "wilful, malicious or grossly negligent conduct," we presume it would have said so. *See Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976).

¶9 Warfield fails to cite to any legal authority supporting her position that the immunity is overcome by the existence of ADA building code or IBC violations. Rather, the cases she relies on deal with the qualified immunity of government officials, the immunity exceptions of the Federal Tort Claims Act, and the government's duty to conduct safety inspections for construction projects. *See Hope v. Pelzer*, 536 U.S. 730, 739-42 (2002) (qualified immunity); *Cousins v. Lockyer*, 568 F.3d 1063, 1069 (9th Cir. 2009) (same); *Faber v. United States*, 56 F.3d 1122, 1124-25 (9th Cir. 1995) (Federal Torts Claim Act); *Daggett v. County of Maricopa*, 160 Ariz. 80, 83-84, 770 P.2d 384, 387-88 (App. 1989) (government's standard of care when conducting safety inspections). None of these cases address the statutorily created immunity, absent "wilful, malicious or grossly negligent conduct," § 33-1551, for land owners who open their land for recreational and educational purposes. And Warfield does not attempt to argue the principles underlying those cases are analogous to the situation here. Thus, the cases cited by Warfield do not support her argument.

¶10 Warfield also attempts to argue the ADA preempts the recreational use immunity statute. Warfield reasons that because the ADA provides greater protections to individuals with disabilities than the recreational use immunity statute does, it necessarily preempts § 33-1551. However, Warfield failed to raise this argument to the trial court, and we do not consider arguments raised for the first time on appeal. *See Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768-69 (App. 2000). Additionally, Warfield did not provide a transcript of the hearing on the motion for summary judgment, and we will not presume that she raised her preemption argument during oral argument. *See Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, ¶ 20, 235 P.3d 285, 291 (App. 2010); *see also* Ariz. R. Civ. App. P. 11(b)(1) (appellant responsible for providing all relevant transcripts).

Gross Negligence

¶11 Warfield next contends the trial court erred in granting summary judgment to the City because she presented sufficient evidence of the City's gross negligence. *See* § 33-1551(A). The recreational use immunity statute defines "[g]rossly negligent" as "a knowing or reckless indifference to the health and safety of others." § 33-1551(C)(2). "'A person is recklessly indifferent if he or she knows, or a reasonable person in his or her position ought to know: (1) that his action or inaction creates an unreasonable risk of harm; and (2) the risk is so great that it is highly probable that harm will result.'" *Armenta v. City of Casa Grande*, 205 Ariz. 367, ¶ 20, 71 P.3d 359, 364-65 (App. 2003), *quoting Williams v. Thude*, 180 Ariz. 531, 539, 885 P.2d 1096, 1104 (App. 1994), *aff'd*, 188 Ariz. 257, 934 P.2d 1349 (1997).

¶12 "Gross negligence is generally a question of fact that is determined by a jury." *Id.* ¶ 21. A trial court may decide the issue as a matter of law, however, "if the plaintiff fails to produce evidence that is 'more than slight and [that does] not border on conjecture' such that a reasonable trier of fact could find gross negligence." *Id.*, *quoting Walls v. Arizona Dep't of Pub. Safety*, 170 Ariz. 591, 595, 826 P.2d 1217, 1221 (App. 1991) (alteration in *Armenta*).

¶13 Warfield first claims the City was negligent because the stairwell at issue was in violation of the ADA building codes and the IBC. But the City's alleged failure to upgrade the stairwell to comply with the codes does not demonstrate the City knew or should have known that a shrubbery root would rupture an irrigation pipe, that the rupture would cause water to leak onto the stairwell, and that the water would make it highly likely that a visitor using the stairwell would slip, fall, and be injured. *See id.* ¶ 20. Warfield therefore has not shown the City knew or should have known that its action or inaction created "'an unreasonable risk of harm'" and that "'the risk [was] so great that it [was] highly probable that harm [would] result.'" *Id.*, *quoting Williams*, 180 Ariz. at 539, 885 P.2d at 1104; *see also Daniels v. Adkins Protective Serv., Inc.*, 247 So. 2d 710, 712 (Miss. 1971) (safety regulation violations are negligence per se, not necessarily "willful and wanton negligence"),

abrogated on other grounds by Adams v. U.S. Homecrafters, Inc., 744 So. 2d 736, ¶¶ 17, 21 (Miss. 1999); *Cacha v. Montaco, Inc.*, 554 S.E.2d 388, 395 (N.C. Ct. App. 2001) (code violations alone do not show gross negligence); *Frazier v. City of Norfolk*, 362 S.E.2d 688, 691 (Va. 1987) (same). Without more, Warfield's argument based on the alleged violations fails.

¶14 The City's lack of the required knowledge of the risk is further supported by the fact that the alleged violations for failing to upgrade the stairwell are questionable, at best, and do not present a "genuine dispute as to any material fact." Ariz. R. Civ. P. 56(a). The ADA building codes apply only to construction or alterations commenced after January 26, 1992. 28 C.F.R. § 35.151(a)(1), (b)(1). Similarly, the 2003 IBC states that "any structure existing on the date of adoption of this code shall be permitted to continue without change." 2003 IBC § 102.6. More generally, a building owner has no legal duty to continually modify structures to comply with each update in the building code. *See Piccola ex rel. Piccola v. Woodall*, 186 Ariz. 307, 312, 921 P.2d 710, 715 (App. 1996); *see also George v. Fox W. Coast Theatres*, 21 Ariz. App. 332, 337, 519 P.2d 185, 190 (1974).

¶15 The City provided evidence that the lower polar bear viewing area, including the stairwell at issue, was approved by the City as complying with all applicable codes when it was constructed in 1988. According to affidavits in support of the City's motion, the area had not changed since at least 1991, and Warfield offered no evidence to the contrary. Thus, because the stairwell's construction pre-dated the ADA and IBC, the stairwell is exempt from their regulations.

¶16 Warfield, however, appears to argue that a 2005 Department of Justice Audit Report ("DOJ Report") found several ADA violations, "specifically called for changes to be made to the very exhibit at issue," and required the City to modify the stairwell at issue. The DOJ Report, attached to an affidavit filed by the City, specified the modifications that were required for ADA compliance, but also noted the required modifications only applied to facilities constructed or modified after January 26, 1992. Although the report found a violation related to the handrail for a wheelchair ramp near the polar bear exhibit, it did not find any violations related to the

exhibit's stairwell. And nothing in the DOJ Report required the City to modify any areas other than those specified in the report. Consequently, the DOJ Report does not support Warfield's position. Rather, it supports the City's argument that the ADA did not require it to modify the area where Warfield fell.

¶17 Warfield also relies on her expert's opinion that because "substantial improvements" had been made to areas of the Zoo other than the lower polar bear viewing exhibit, the City was required to modify the stairwell at issue to comply with the ADA building codes and 2003 IBC. But he bases this solely on the Zoo's own publication showing the construction of an "expansion yard" to the polar bear enclosure, not the viewing area, in 2002. Given the clear language regarding the date of applicability in the ADA building code and the 2003 IBC, the lack of any evidence the stairwell or even the larger lower polar bear viewing exhibit was modified after 1988, and the fact that the 2005 DOJ Report did not require modifications to the stairwell, the expert's opinion does not create a genuine issue of material fact relevant to Warfield's claims.

¶18 Warfield next argues she produced sufficient evidence of negligent acts other than the violation of the building codes to withstand summary judgment. For example, Warfield contends that the City knew the irrigation system as a whole often required repairs yet still kept the Zoo open to the public. But, as Warfield conceded below, the City had no reason to know about the leaking irrigation pipe prior to Warfield's fall. The underground pipe had been in place for approximately twenty to thirty years and no prior problems with it had been reported. Several employees stated they checked the public grounds, including the stairwell, several times a day and did not recall seeing any water on the stairs in the hours before Warfield's fall. The employees also stated that, had water been present on the stairs, they would have reported the issue to the Zoo supervisor. Thus, the City could not have been "knowing[ly]" indifferent to a hazard it had no reason to anticipate. *See* § 33-1551(C)(2).

¶19 The additional facts relied upon by Warfield similarly do not demonstrate that the City acted with "reckless indifference." *See* § 33-1551(C)(2). Although the Zoo's employees said they were

aware that occasionally sprinkler overspray would wet the stairwell, that fact does not demonstrate the employees knew or should have known that a shrubbery root would rupture the irrigation pipe, causing water to leak onto the stairwell. And the fact that employees knew the drain on the landing of the stairwell could clog when it rained is irrelevant, because Warfield slipped on the stairs, not the landing, and there was no rain on either the day of or before Warfield's fall.[2] Lastly, evidence that a visitor fell on the landing of the same staircase two years prior to Warfield's fall would not have put the City on notice that an irrigation pipe would be ruptured by a shrubbery root two years later. Therefore, whether the alleged negligent acts are considered individually or collectively, no reasonable trier of fact could have found the City acted with gross negligence. Summary judgment in favor of the City was therefore appropriate. *See Armenta*, 205 Ariz. 367, ¶ 23, 71 P.3d at 365.

Motion to Amend

¶20 Warfield lastly argues the trial court erred by denying her motion to amend her complaint. "We review a trial court's denial of a motion to amend a complaint for an abuse of discretion." *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.R.*, 231 Ariz. 517, ¶ 4, 297 P.3d 923, 925 (App. 2013). Leave to amend is discretionary, but should be granted "'unless the court finds undue delay in the request, bad faith, undue prejudice, or futility in the amendment.'" *Id.*, *quoting MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996); *see also* Ariz. R. Civ. P. 15(a).

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[2]Warfield asserts that it rained the day before her fall and therefore Zoo employees should have been aware of the dangerous condition. However, Warfield's only evidence is a news article reciting the total rainfall for the first two weeks of July 2011, but does not provide any daily rain totals. Moreover, the article, dated the day before Warfield's fall, explicitly states the rainy season was "taking a break through the rest of this week." The City produced data from the National Oceanic and Atmospheric Administration showing there had been no rain in Tucson for several days prior to Warfield's fall.

¶21 Warfield's proposed amended complaint added a claim for negligence per se based on the alleged ADA and IBC violations and was filed after the motion for summary judgment had been filed. Warfield contends her motion should have been granted and the hearing on the summary judgment motion should have been postponed. However, the trial court determined, as have we, that Warfield failed to establish that any alleged violation of the ADA or IBC would amount to gross negligence or that a "genuine dispute as to any material fact" existed as to whether the stairwell was in violation of the ADA or the 2003 IBC. *See* Ariz. R. Civ. P. 56(a). And even if Warfield had established the violations, the City was still immune from liability under the recreational use statute, based on the issues as presented to this court. *See* § 33-1551(A). Warfield's proposed amendment was therefore futile and the trial court did not abuse its discretion in denying her motion. *See Walls*, 170 Ariz. at 597, 826 P.2d at 1223.

Attorney Fees on Appeal

¶22 The City has requested its attorney fees pursuant to A.R.S. § 12-349 and Ariz. R. Civ. App. P. 21(c), contending this appeal was brought without substantial justification. "'[W]ithout substantial justification' means that the claim or defense is groundless and is not made in good faith." § 12-349(F). Both of these elements "must be proven by a preponderance of the evidence and 'the absence of even one element render[s] the statute inapplicable.'"[3] *Reynolds v. Reynolds*, 231 Ariz. 313, ¶ 16, 294 P.3d 151, 156 (App. 2013), *quoting Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, ¶ 49, 257 P.3d 1168, 1181 (App. 2011). If both elements are proven, the statute mandates an award of reasonable attorney fees. § 12-349(A).

[3] Under *Reynolds*, a finding that an action or defense was brought "without substantial justification" required a determination that it constituted harassment. *Reynolds*, 231 Ariz. 313, ¶ 16, 294 P.3d at 156; 2012 Ariz. Sess. Laws, ch. 305, § 2. As of January 1, 2013, such a determination is no longer required, but a party must still show the claim is "groundless and is not made in good faith." 2012 Ariz. Sess. Laws, ch. 305, § 2.

¶23 Many of Warfield's arguments on appeal were difficult to discern and largely unsupported by relevant legal authority or evidence in the record. She additionally misrepresented evidence in the record, such as whether it rained prior to her fall, and the substance of the DOJ Report. She also raised an issue that had not been argued below and was therefore forfeited on appeal. This conduct could result in an award of fees against a party and counsel. *See Mangan v. Mangan*, 227 Ariz. 346, ¶ 32, 258 P.3d 164, 172 (App. 2011) (responsibility for attorney fees award based on misrepresentation of record and reliance on unpublished legal authority shared equally between party and appellate counsel). But we were unable to conclude that this appeal, although weak, was not brought in good faith. § 12-349(A), (F); *Reynolds*, 231 Ariz. 313, ¶ 16, 294 P.3d at 156. Accordingly, we deny the City's request for attorney fees on appeal. As the prevailing party on appeal, however, the City is entitled to its costs on appeal upon its compliance with Rule 21.

Disposition

¶24 For the foregoing reasons, we affirm the judgment of the trial court.